



Environmental Protection Agency

Division of Surface Water

Interim Response to Comments

December 2010

Rule: OAC 3745-32 (Section 401 water quality certification rules)
OAC 3745-45 (Section 401 water quality certification fees)

Agency Contact for this Package

Ric Queen
Division of Surface Water
(614) 644-2872
ric.queen@epa.state.oh.us

Ohio EPA made available for review and comment draft changes to the Section 401 water quality certification rules in OAC 3745-32 in September 2008. In March 2010, the Agency is making updated draft rules available for review and comment. This document identifies the comments and questions received to date on the draft rules. One of the comments is addressed in this response to comments document. The others will be addressed at the end of the comment period.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the comments and questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

General Comments

Comment 1: The relationship between a 401 Water Quality Certification (WQC), State Water Quality Permit (SWQP), and Isolated Wetlands Permit are unclear. ODOT is unsure whether OEPA intends the SWQP as a new type permit or as a general term including 401 WQCs and/or an Isolated Wetlands Permits. Currently, ODOT interprets the SWQP to be a general term including all 401 WQCs and Isolated Wetlands, and proposes to include non-federally protected waters (i.e., isolated streams). ODOT requests that the OEPA provide a clear definition of the proposed SWQP. (Timothy M. Hill, ODOT)

Response 1: This comment remains under consideration.

Comment 2: The draft rule packages include numerous new terms referenced, such as State Water Quality Permit, water conveyance, and upland drainage to name a few. Throughout these comments we have pointed out those terms that are not adequately defined in the draft rules and of specific significance to all applicants; there is no cross reference of commonality with like terms in USACE rules. We would suggest that OEPA coordinate the development of the draft rules and new terms with the USACE. (Timothy M. Hill, ODOT)

Response 2: This comment remains under consideration.

Comment 3: ODOT, unlike the vast majority of applicants to OEPA, is required by federal law to evaluate each project through a rigorous environmental review and approval process as prescribed by the National Environmental Policy Act (NEPA). Identifying and studying alternatives for a project is key to the NEPA process' objective of finding transportation solutions that help preserve and protect the value of environmental and community resources.

The overall expectation of the ODOT's NEPA alternative analysis process is to provide the least damaging alternative to the overall environment through improved decision making, stakeholder and public involvement, and collaboration with various resources agencies. ODOT consistently develops, as required by NEPA, the least overall environmentally damaging alternative. Every ODOT project utilizes pollution prevention and best management practices. Additionally, ODOT mitigates impacts to all environmental resources (i.e., streams, wetlands, historic sites, historic buildings, threatened and endangered species, etc) as prescribed by numerous state and federal laws.

The further development of alternatives for the State Water Quality Permit Application (Preferred, Minimal Degradation, Non-Degradation, and the Mitigative Technique Alternatives) is often redundant, and unnecessarily expensive and time consuming. ODOT respectfully suggests that OEPA consider abbreviated State Water Quality Permit Application requirements for projects, such as ODOT's, that are evaluated through NEPA; specifically, limiting the amount of required alternatives studies. (Timothy M. Hill, ODOT)

Response 3: This comment remains under consideration.

Comment 4: Throughout the Draft Antidegradation rules, as well as the Draft 401 Water Quality Certification and the Draft Water Quality Standards, issues related to Public Safety are not listed as a potential cause/reason for the lowering of water quality. The construction and continual maintenance of Ohio's transportation system, in light of maintaining and improving public safety, should be considered when allowing the possible degradation to waters of the State. (Timothy M. Hill, ODOT)

Response 4: This comment remains under consideration.

Comment 5: As with the general theme of the comments below, OEPA's draft rules are not specific enough to apply them. Two of the key gaps include: (1) types/levels of the State water quality permit (i.e., nationwide and individual) and their thresholds, and (2) Waters of the State are not clearly defined, specifically as to when this rule applies to isolated streams. (Timothy M. Hill, ODOT)

Response 5: This comment remains under consideration.

Comment 6: For consistency capitalize US Army Corps of Engineers (USACE) and Section 404 throughout the document. (Timothy M. Hill, ODOT)

Response 6: Ohio's Legislative Service Commission has requirements on how text in the Ohio Administrative Code must be presented. Among the requirements is that very few terms are allowed to be capitalized. The requirements are in their Rule Drafting Manual, which is on the Web at www.lsc.state.oh.us/rules/index.html.

Rule 3745-32-01 Definitions.

Comment 7: *(C) "Discharge of dredge material" means any addition of dredged material into waters of the state including redeposit of dredged material other than incidental fallback. The term includes but is not limited to the addition of dredged material to a specified discharge site located in waters of the state and the runoff or overflow from a contained land or water disposal area.*

Comment #1: The words "of dredge material" struck from the 5th and 6th line in reference to "runoff or overflow from a contained land or waste disposal area" implies that other materials other than dredge can be included as a discharge within this definition. It should be made clear that the materials referenced which may run off or over flow from the contained land or waste disposal area are specifically dredge materials. Replace the phrase "of dredge materials".

Comment #2: The phrase "Discharge of pollutants into Waters of the State resulting from the subsequent onshore processing of dredge material that is extracted from any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction of such material may require a permit from the Army Corps of Engineers under Section 10 of the Rivers and Harbors Act" has been struck from the definitions. This phrase specifically states that pollutants subject to Section 402 are not subject to Section 404/Section 401. This phrase is included within the federal definition of "discharge of dredge material" and should be included within this definition. It should be perfectly clear that pollutants regulated under

Section 402 are not regulated under Section 404 and Section 401. This has been and continues to be a point of confusion between the regulating community and the regulated community. (B & N Coal, Inc.)

Response 7: This comment remains under consideration.

Comment 8: ***(G) "'Fill material' means any pollutant material used to fill an aquatic area to replace an aquatic area with dry land or to ..."***

Comment: OEPA should provide a definition of "aquatic area" that includes how this term relates to waters of the U.S. and waters of the State. (Timothy M. Hill, ODOT)

Response 8: This comment remains under consideration.

Comment 9: ***(J) "Non-federally protected waters" means a Water of the State, other than isolated wetlands regulated pursuant to sections 6111.02 to 6111.029 of the revised code that is determined by the USACE to be a water outside of the jurisdiction of the Federal Water Pollution Control Act. "***

Comment: This extends the states jurisdiction beyond federal authority and could include about any feature that would result from flowing water. Delete this definition. (B & N Coal, Inc.)

Response 9: This comment remains under consideration.

Comment 10: ***(M) State water quality permit means either: 2) A permit from OEPA pursuant to 6111 of the Revised Code and Chapter 3745-32 of the Administrative Code for discharges to non-federally protected waters.***

Comment: This extends the state permitting authority beyond federal permitting authority and should be deleted. (B & N Coal, Inc.)

Response 10: This comment remains under consideration.

Comment 11: ***(O) "Waters of the State" means the same as defined in section 6111.01 of the revised code. This definition states waters of the state means all streams lakes ponds marshes watercourses waterways wells springs irrigation systems drainage systems and other bodies or accumulations of water surface and underground, natural or artificial regardless of the depth of the strata in which underground water is located that are situated wholly or partly within or border upon this state or are within its jurisdiction except those private waters that do not combine or effect a junction with natural surface or underground waters.***

Comment #1: The phrase "except those private waters that do not combine or effect a junction with natural surface or underground waters" has historically been very confusing. I have asked several individuals with the OEPA to explain to exactly what is excepted and have never receive a

consistent or satisfactory response. The opportunity should be taken to clarify this statement. If it is in fact referencing "isolated waters" on private properties then this should be stated clearly. And if it does mean anything else other than that, then this should be specifically stated.

Comment #2: Provide a definition for private waters (i.e. waters that originate on private property and exist within the boundaries of that property). (B & N Coal, Inc.)

Response 11: This comment remains under consideration.

Rule 3745-32-02 Applicability.

Comment 12: *(B) "Every applicant for a permit from the United States army corps of engineers pursuant to both section 404 of the Federal Water Pollution Control Act and section 10 of the Rivers and Harbors Act that authorizes any activity that may result in a discharge of dredged or fill material into waters of the state shall apply for and obtain a state water quality permit from the director."*

Comment: ODOT often has roadway projects impacting Section 10 Rivers authorized with Nationwide Permits through a Pre-Construction Notification. ODOT recommends that this section be modified so that only projects requiring Individual 404 permits, or those projects that meet NWP's but do not meet the Ohio State Certification General Limitations would require a state water quality permit. (Timothy M. Hill, ODOT)

Response 12: This comment remains under consideration.

Comment 13: *(C) "Every Applicant for a permit from the United States army corps of engineers pursuant to section 10 of the Rivers and Harbors Act shall apply for and obtain a state water quality permit from the director."*

Comment: Under Section 10 of the Rivers and Harbors Act all work performed in or over navigable waters of U.S. must be authorized by the USACE. By USACE definitions, examples of work requiring authorization under Section 10 include overhead utility lines, submarine utility crossings, navigational lighting installation; that is work which in no way affects water quality. The Rivers and Harbors Act primary function is to protect navigation. ODOT suggests that the paragraph be deleted. Any authorized project under Section 10 and impacting water quality is covered under 3745-32-02(B). (Timothy M. Hill, ODOT)

Response 13: This comment remains under consideration.

Comment 14: *(D) Every applicant that proposes to discharge dredged or fill material into non federally protected waters shall apply for and obtain a state water quality permit from the director.*

Comment: This expands the authority of the OEPA beyond federal authority. Delete this provision. (B & N Coal, Inc.)

Response 14: This comment remains under consideration.

Comment 15: *(D) "Every applicant that proposes to discharge dredged or fill material into non federally protected waters shall apply for and obtain a state water quality permit from the director."*

Comment: Resources that are often identified during field investigations by an applicant are sometimes determined to be not under federal jurisdiction by the USACE. What is and what is not under the USACE jurisdiction has been under substantial discussion/modification in the last few years. Typically the USACE JD letter is limited to identifying only jurisdictional streams, jurisdictional wetlands, jurisdictional ditches, and isolated wetlands. The term "waters" used in this rule has been described as being synonymous with "waters of the state". The ORC definition of "waters of the state" includes features that would not be included in the USACE JD. For example, in the JD letter, the USACE does not routinely identify resources as non federally protected isolated streams, non federally protected isolated lakes, non federally protected isolated ponds, non federally protected isolated upland drainages, non federally protected isolated water conveyances, non federally protected isolated water bodies, non federally protected isolated waterways, non federally protected isolated wells, non federally protected isolated drainage systems, non federally protected isolated irrigation systems, non federally protected isolated water courses, non federally protected isolated springs, non federally protected isolated other bodies of water, or non federally protected isolated accumulations of water. There is no certainty as to what resources beyond what the USACE determined to be federal jurisdiction or "isolated wetland" the OEPA would be concerned with under the definition of "waters of the state" (as defined in ORC 6111.01) within the application for a State Water Quality Permit (SWQP). The definition given in 3745-32-01 (J) of "non-federally protected waters" defines those waters that fall outside of those resources considered waters of the U.S. (and isolated wetlands which are already covered by ORC 6111) as determined by the USACE. If the identification and delineation of, and avoidance, minimization and/or mitigation of these unknown isolated resources is to be mandated by rule, then from ODOT's perspective, the planning and scoping of consultants or ODOT staff to perform such actions within project development, planning, and included within the SWQP application, would need to be made known prior to the review by the OEPA of the submitted SWQP. Based on the definition of waters of the state provided in ORC 6111.01, it remains highly uncertain where the jurisdiction of the OEPA begins and ends and therefore the applicability of the SWQP. (Timothy M. Hill, ODOT)

Response 15: This comment remains under consideration.

Comment 16: *(F) Exemptions. No state water quality permit need be obtained for:*

Comment: Add a section for Industrial categories with established limitations and standards for specified waste streams as promulgated under Sections 304 and 306 of the CWA and incorporated within Section 402 permits as issued by the Ohio EPA. Pollutants such as total suspended solids and settleable solids although having an associated effect over time of raising the bottom elevation of water due to settling of water borne pollutants are not considered fill materials. And that discharges subject to effluent limitations guidelines and standards are to be regulated under Section 402 of the CWA. This distinction was clearly outlined within the preamble to the rule making for the definitions of fill material promulgated on May 9, 2002 (FR: Vol. 67; No. 90; Section II (B)(f); pg. 31135). See attachment titled *Federal Register Vol. 67, No. 90 sub part f. Effluent Guideline Limitations and 402 Permits.* (B & N Coal, Inc.)

Response 16: This comment remains under consideration.

Rule 3745-32-03 Individual state water quality permit application requirements and procedures.

Comment 17: *(B)(2)(a-j) "The applicants investigation report of the waters of the United States, in support of the section 404 permit application for the proposed project if applicable;"*

Comment: A majority of the features described in the ORC definition of "waters of the state" are not currently under the jurisdiction of the USAGE, and therefore would not be included in the investigation report submitted to the USAGE. If it is the intention of the OEPA to regulate waters not routinely taken under the jurisdiction of the USACE, then guidance must be provided on how these resources are identified and reported to the OEPA when these are the very resources when impacted, necessitate the submittal of a SWQP application. Again, clarification of when the SWQP is necessary when impacts are proposed to resources other than wetlands and streams must be provided to the regulated community. OEPA should plainly explain in rule when a SWQP is necessary versus when a 401 WQC is needed and how these terms/permits are related. (Timothy M. Hill, ODOT)

Response 17: This comment remains under consideration.

Comment 18: *(B) Application requirements.*

(2) Any application for a state water quality permit subject to the provision of this rule and impacting waters of the state shall include:
(d) A specific and detailed mitigation proposal including the location and proposed legal mechanism for protecting the property in perpetuity;

Comment #1: The term "perpetuity" was introduced into the Ohio Revised Code for Section 401 Certifications under House Bill 66 effective date September 29, 2005 but the term perpetuity was not defined and thus the

meaning of the term is not clear. The reference to perpetuity can mean a perpetual condition: the state of continuing for a long time vs. eternity or the rest of time. Although these definitions vary only slightly the difference can be considerable when dealing with real estate instruments or other forms of protection. The federal rule effective in June 2008 recognizes this and references protection as "long term" and based on the Corps comments published in Vol. 73, No. 70 on April 10, 2008 defines long term protection as measures taken to sustain and preserve the compensatory mitigation project after performance standards are met and monitoring requirements have been fulfilled. Revise the current OEPA language to exclude the term perpetuity and replace with **"long term protection"**.

Comment #2: The Ohio EPA rule states a "legal mechanism" as the form of protection. The Corps new rule effective June 9, 2008 states "The aquatic habitats, riparian areas, buffers and uplands that comprise the overall compensatory mitigation project must be provide long term protection though real estate instruments or other available mechanisms as appropriate" (Vol. 73, No. 70. 230.97(a)(1)). This rule also defines protection based on a real estate instruments but goes further to include other available mechanisms as appropriate. The Corps comments in this rule making that "due to the variability in legal instruments and real estate laws specific terms for real estate instruments cannot be required. Thus terms for conservation easements, restrictive covenants, and other mechanisms are more appropriately addressed by district engineers on a case by case basis". Based on this dialoged, the Corps leaves the length of the protection and the type of protection at the discretion of the DE based on project need. Revise the current OEPA language to exclude legal mechanism and replace with: **"real estate instruments or other available mechanisms, as appropriate" and provide a statement giving the director the discretion to base the final decision for mitigation site protection on project needs.** (B & N Coal, Inc.)

Response 18: This comment remains under consideration.

Comment 19: (B)(2)(e) Applicable fees:

Comment: Section 3745-45-02 Certification Fees has been rescinded. Reference the applicable section for certification fees section 3745.114. (B & N Coal, Inc.)

Response 19: This comment remains under consideration.

Comment 20: (B)(4) Use attainability analysis.

(a) The use attainability analysis required by paragraph (B)(2)(c) of this rule shall consist of the following:

(iv) If the QHEI score is greater than forty for a given stream, a representative number of qualitative macro-invertebrate and fish samples for that stream must be provide;

Comment : At <45 streams generally fall either into the use designation of limited resource water or modified warm water habitat and at >60 streams can typically be designated as either warm water or exceptional warm water habitat. At these two extremes of the scoring scale, the Ohio EPA has determined that streams can be fairly confidently designated. The range in between, 45 to 60, is less predictable based on the degree of stream impacts (modifications). Streams within this range can either be designated as warm water or modified warm water habitat. The more modifications impacting the stream the less likely it can achieve a warm water habitat designation. To aid in evaluating the streams response to modification the Ohio EPA has compiled a list of habitat characteristics and the influence those particular characteristics have on determining use attainment. Thus a designated use of warm water habitat is less likely as streams compile greater numbers of the negative characteristics. Based on this information as provided by the Ohio EPA document *titled "The Qualitative Habitat Evaluation Index (QHEI): Rationale, Methods and Application"* the general habitat designation can be fairly confidently predicted and the need to provide expensive fish and macro-invertebrate surveys avoided. This was specifically the Ohio EPA's intent in the development of the QHEI. See attachment, section from the above reference document titled *"Using the QHEI in the Use Designation Process"* (pg 40 through pg 42). (B & N Coal, Inc.)

Response 20: This comment remains under consideration.

Comment 21: ***(B)(4)(a)(iv) "If the QHEI score is greater than forty for a given stream, a representative number of qualitative macroinvertebrate and fish samples for that stream must be provided;"***

Comment: OOOT believes that requiring aquatic life sampling on streams that are unlikely to support a warmwater assemblage of aquatic organisms will be costly and time consuming, and will provide little value in assessing streams that would have likely been adequately assessed using the QHEI alone. OEPA's own documentation indicates that, "QHEI scores from hundreds of segments around the state have indicated that values greater than 60 are generally conducive to the existence of warmwater faunas whereas scores less than 45 generally cannot support a warmwater assemblage consistent with the WWH biological criteria." At a minimum, the QHEI score threshold for requiring aquatic sampling should be raised to 45, if not higher. In addition, no biological sampling should be required on streams with obvious chemical impairments (such as low pH in AMD streams) that would, without question, limit the aquatic life potential of a stream regardless of habitat quality. OEPA should clarify whether they intend to require qualitative sampling for the use attainability analysis (as stated in (B)(4)(a)(iv) and (v) or quantitative sampling as described in the methods cited in 3745-32-03(B)(4)(b) as 3745-1-03. The procedures and methods in 3745-1-03 for biological sampling only include quantitative sampling methods for calculating the IBI, Miwb, and ICI. Conducting this

type of quantitative sampling would be extremely time consuming and costly for ODOT (especially for aquatic macroinvertebrate sampling). Requiring quantitative sampling would likely result in project delays (biological sampling could only occur between mid-June and late September), and may cost ODOT as much as \$40,000 per stream assessment (based on a consultant prepared cost proposal for conducting one IBI and one ICI on Big Darby Creek).

If qualitative sampling is to be required, ODOT requests that OEPA elaborate on the sampling methods they would like used and the taxonomic level (specifically for aquatic macroinvertebrates) that the organisms should be identified to. ODOT would not be opposed to the use of a qualitative aquatic macroinvertebrate assessment that could be conducted in the field with little additional cost and time delay (such as the current HMFEI used for PHWH streams), but would be extremely opposed to being asked to use the costly and time consuming quantitative methods associated with the ICI (sample equipment needs to remain in the stream for a period of 6 weeks, and aquatic macroinvertebrates need to be identified to the lowest taxonomic level in the laboratory). (Timothy M. Hill, ODOT)

Response 21: This comment remains under consideration.

Comment 22: *(B)(4)(a)(v) "A representative number of qualitative macroinvertebrate, fish, or amphibian samples for a stream may be provided by the applicant to supplement the HHEI or QHEI assessment for that stream."*

Comment: Is this rule relying on the applicant to determine when a qualitative sample should or should not be provided to OEPA or is this at OEPA's discretion? Regardless of who determines the necessity to provide said sample, criteria that must be met in order for a sample to be required to be submitted should be published for comment. (Timothy M. Hill, ODOT)

Response 22: This comment remains under consideration.

Comment 23: *(G) Expiration and renewal.
(1) A state water quality permit shall expire within five years of the date of issuance or upon the expiration of the applicable federal license or permit, whichever is less.*

Comment #1: Expiration of the Section 401 certification should be tied to the expiration of the federal permit.

Comment #2: Add the statement for Isolated Wetland Permits. A State Isolated Wetland permit shall expire 5 years after the date of issuance. (B & N Coal, Inc.)

Response 23: This comment remains under consideration.

Comment 24: *(G)(3) "Request for renewal of state water quality permits must include a notarized statement that the conditions contained in paragraph (G)(2) of this rule ..."*

Comment: Renewal requires a "notarized statement". For State of Ohio projects, who notarizes? Is this requirement needed? (Timothy M. Hill, ODOT)

Response 24: This comment remains under consideration.

Comment 25: *(G)(4) "Renewals of state water quality permits shall be issued as draft actions and subject to the public notice requirements of Chapter 3745-47 of the Administrative Code."*

Comment: This section states that a renewal (or extension) of an existing 401 WQC will require public notice procedures be met. Why is this required if the applicant certifies nothing has changed with their proposal and the related impacts? ODOT's large linear transportation projects often take longer than five years to construct. ODOT recommends not requiring the additional public notice requirement. Also, ODOT suggest that a major transportation project be granted a 10 year certification timeframe, up front, on the first certification. (Timothy M. Hill, ODOT)

Response 25: This comment remains under consideration.

Comment 26: *(L)(3) "Applicants applying for coverage under the section 404 general permits are not required to comply with the application requirements contained in this rule unless the director determines that an individual state water quality permit is required."*

Comment: This rule appears to contradict rule 3745-32-02(A). Perhaps 3745-32-02(A) should read, "Every applicant for an individual permit from the United States Army Corps of Engineers pursuant to section 404 of the Federal...". (Timothy M. Hill, ODOT)

Response 26: This comment remains under consideration.

End of Response to Comments